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Mogan a/l Ganeson v Jabatan Kebajikan Masyarakat & Anor

B HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-12B-19–05 OF 2019
AWANG ARMADAJAYA JC
11 NOVEMBER 2019

C *Family Law — Children — Adoption — Decision delivered without report prepared by welfare officer who acted as guardian ad litem tendered in court — Whether report was mandatory for consideration by sessions court judge — Adoption Act 1952 s 6*

D This was an appeal against the decision of the session court judge. The appellant was a male aged 33 years old who wished to adopt a young baby girl who at the time of application for adoption aged three months old. The biological mother of the infant, ie the second respondent had consented to the
E adoption. A report was prepared by an officer with the Malaysian Welfare Department, (who acted as guardian ad litem to the infant) upon a directive by the first learned sessions judge, Her Honour Puan Sabariah bt Atan. Before the report could be tendered in the sessions court for the consideration of the learned sessions court judge, Puan Sabariah bt Atan passed away. A decision
F was delivered by His Honour Tuan Mohamad Haldar bin Abdul Aziz, another sessions court judge who took over the case upon the earlier session court judge's demise. The learned senior federal counsel had drawn the attention of this court to the infirmity of the proceedings in the court below. The issue for consideration was whether the report prepared by a welfare officer who acted as
G a guardian ad litem was mandatory for consideration by the learned sessions court judge.

Held, setting aside the order of the sessions court and remitting matter to the same court for admission and consideration of the guardian ad litem report:

H (1) The Adoption Act 1952 ('the Act'), in particular s 6(b), required that before an order could be made, such a report must be prepared so as to afford the court to assess the facts and circumstance of the case and decide on an order that must be for the well being of the child, with due regards given to the wishes of the child, after taking into account of age and
I ability of understanding of the child. Since the court must be satisfied of all requirements under s 6 of the Act, a guardian ad litem's report was a mandatory requirement. There was no proper report by the guardian ad litem submitted to the sessions court. Hence, a critical procedural step (which was mandatory) had been missed. This court could not salvage

this lack of procedure as it was not only mandatory but also invaluable, hence rendering the order of learned sessions court judge defective, null and void (see paras 16, 19 & 22).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen. Perayu adalah seorang lelaki berusia 33 tahun yang ingin mengangkat bayi perempuan yang pada masa permohonan untuk pengangkatan berusia tiga bulan. Ibu kandung bayi iaitu responden kedua telah bersetuju untuk pengangkatan. Satu laporan telah disediakan oleh seorang pegawai Jabatan Kebajikan Malaysia, (yang bertindak sebagai penjaga ad litem kepada bayi) atas arahan oleh hakim sesyen pertama yang bijaksana, Puan Hakim Sabariah bt Atan. Sebelum laporan dapat ditender di mahkamah sesyen untuk pertimbangan hakim mahkamah sesyen yang bijaksana, Puan Sabariah bt Atan meninggal dunia. Keputusan telah disampaikan oleh Tuan Hakim Mohamad Haldar bin Abdul Aziz, seorang hakim mahkamah sesyen yang mengambil alih kes tersebut setelah kematian hakim mahkamah sesyen sebelumnya. Peguam kanan persekutuan yang bijaksana telah menarik perhatian mahkamah ini kepada kelemahan prosiding di mahkamah bawahan. Isu untuk pertimbangan adalah sama ada laporan yang disediakan oleh pegawai kebajikan yang bertindak sebagai penjaga ad litem adalah wajib untuk dipertimbangkan oleh hakim mahkamah sesyen yang bijaksana.

Diputuskan, mengetepikan perintah mahkamah sesyen dan meremitkan perkara ke mahkamah yang sama untuk kemasukan dan pertimbangan laporan penjaga ad litem:

(1) Akta Pengangkatan 1952 ('Akta'), khususnya s 6(b), menghendaki agar sebelum sesuatu perintah dapat dibuat, laporan sebagaimana tersebut mesti disediakan supaya mahkamah dapat menilai fakta dan keadaan kes tersebut dan memutuskan perintah yang perlu untuk kesejahteraan anak, dengan memberi perhatian yang sewajarnya kepada kehendak anak, setelah mengambil kira usia dan kemampuan memahami anak. Oleh kerana mahkamah perlu memenuhi semua syarat di bawah s 6 Akta, laporan penjaga ad litem adalah syarat wajib. Tiada laporan yang betul oleh penjaga ad litem yang diserahkan ke mahkamah sesyen. Oleh itu, langkah prosedur kritikal (yang wajib) telah tertinggal. Mahkamah ini tidak dapat menyelamatkan kekurangan prosedur ini kerana ia bukan sahaja wajib tetapi juga tidak ternilai, oleh itu menjadikan perintah hakim mahkamah sesyen yang bijaksana cacat, batal dan tidak sah (lihat perenggan 16, 19 & 22).]

Legislation referred to

Adoption Act 1952 s 6, 6(b)

Raman Vellu (Raman Vellu & Co) for the appellant.
Jailani bin Abdul Rahman (Senior Federal Counsel, Johor State Legal Advisor's Office) for the respondent.

Awang Armadajaya JC:

INTRODUCTION

[1] This is an appeal against the decision of the lower session court judge given on 16 May 2019. On 21 May 2016, the appellant filed the notice of appeal against the said decision. The first learned sessions judge to the case hear the matter was Her Honour, Puan Sabariah bt Atan, who, after the conclusion of the hearing, passed away.

[2] The second respondent (who is the biological mother of the infant in question) was absent and unrepresented.

[3] The decision was delivered by His Honour Tuan Mohamad Haldar bin Abdul Aziz who took over the cases left by the late Puan Sabariah bt Atan.

BACKGROUND FACTS

[4] The appellant is a male aged 33 years old who wishes to adopt a young baby girl by the name on Annupallavi (birth certificate No DS 63848) who at the time of application for adopted aged three months old.

[5] The biological mother of the infant, Madam Santhakumari a/p Raman (NRIC No 741108–01–6476) has consented to the adoption.

[6] The appellant was 'married' to a transgender person by the name of Harvendran a/l Raman on 3 February 2017 in accordance with Hindu rites at Johor Bahru. The transgender was said to have undergone sex change operation before the marriage and answers to the name of S Harinee. The procedure was performed at Rajyindee Hospital, Thailand on 17 May 2012.

[7] Further, Hareendran was examined by a Malaysian medical practitioner, Dr Punithavathy a/p Nasadurai at the Klinik Kesihatan, Selayang Baru, Batu Caves, Selangor. A letter from Rajyindee Hospital, Thailand and a letter from the said doctor are exhibited as 'MG3' in the appeal record.

[8] The Hindu Sangam, a registered Society for Hindus in Malaysia, has issued a letter stating that the Hindu religious accepts transgender and has no objection to the intention of the couple to adopt a child. A message from the organisation dated 12 February 2019 and exhibited as 'MG4'.

[9] An ongoing suit against Jabatan Pendaftaran Negara (National Registration Department) seeking a declaration that the partner of the appellant is Hareendran a/l Ramakrishnan has been filed in another High Court 1, Johor Bahru until the date of this decision. The High Court 1 (Civil) Johor Bahru, has not made any ruling.

THE ISSUES IN THIS APPEAL

[10] There is one preliminary issue that this court must decide before going into merits of the appeal. The issues are whether the report prepared by a welfare officer who acts as a guardian ad litem is mandatory for consideration by the learned sessions court judge.

[11] As it happened, a report (encl 'B') was prepared by Encik Haris bin Suman, an officer with the Malaysian Welfare Department, (who acted as guardian ad litem to the infant) upon a directive by the then learned sessions court judge, late Puan Sabariah bt Atan. Before the report could be tendered in the sessions court for the consideration of the learned sessions court judge, Puan Sabariah bt Atan passed away.

[12] A decision was delivered by Tuan Mohamad Haldar bin Abdul Aziz, another sessions court judge who took over the case upon the earlier session court judge's demise.

[13] The learned senior federal counsel in the person of Tuan Jailani Abdul Rahman has drawn the attention of this court to the infirmity of the proceedings in the court below. For the record, no one is to be blamed because the learned sessions court judge, Puan Sabariah bt Atan who heard the matter, passed away soon after and before the delivery of the decision. The succeeding sessions court judge, Tuan Haldar had to shoulder the responsilibity and he did so, in the manner worthy of a judge. I must commend him for that.

[14] What was missing in the records was the guardian ad litem's report. It has yet to be tendered, when Puan Sabariah bt Atan passed away. It must be noted that the learned appellant's counsel during the hearing of the appeal informed this court that he has no objection for the report to be accepted at the appellate stage and the report was marked as 'encl B'.

[15] It was submitted by the learned senior federal counsel that s 6(b) of the

Adoption Act 1952 makes it mandatory for such a report to be prepared, tendered and that it must be considered by the court.

[16] After studying the law of adoption particularly, I am of the view that the Adoption Act 1952 (Act 237), in particular s 6(b), requires that before an order could be made, such a report must be prepared so as to afford the court to assess the facts and circumstance of the case and decide on an order that must be for the well being of the child, with due regards given to the wishes of the child, after taking into account of age and ability of understanding of the child:

> 6 Matters with respect to which Court to be satisfied
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> The Court before making an adoption order shall be satisfied —
>
> (a) that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order of which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;
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> (b) *that the order if made will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child;*
>
> (c) that neither the applicant nor the parent or guardian has received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant or the parent or the guardian any payment or other reward in consideration of the adoption except such as the Court may sanction; and
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> (d) that there has been a substantial change in the circumstances, if it appears that the applicant has made a previous application under this Act in respect of the same child.

[17] The requirements of the law is that for the order to be made must have the following consideration:

(a) that it will be for the welfare of the child; and

(b) due consideration, being for this purpose, given to the wishes of the child, having regard to the age and understanding of the child.

'The welfare of the child' here is to mean 'in the best interest of the child, be it emotional, intellectual, physical, financial or any legitimate consideration that would bring the best in the child's upbring'.

[18] Of course, I say this, in the context, of the reality of the time and circumstances of the case.

[19] Since the court must be satisfied of all requirements under s 6, a guardian ad litem's report is a mandatory requirement.

[20] As this child, is still an infant of tender years, nothing may be elicit from the child or her wishes given the extremely young age and the lack of understanding of the child.

[21] However, a report must still be prepared which must include (but not limited to) the background of the family of the infant, the socio-economic condition of the original, biological family as well the intended adopted family, the ability to give the best care for the child and the long term relationship between the child and the proposed adopted family (the term 'child' and 'infant' is used quite liberally and interchangeably in the context of this case).

[22] There was no proper report by the guardian ad litem submitted to the sessions court. Hence, a critical procedural step (which is mandatory) has been missed. This court cannot salvage this lack of procedure as it is not only mandatory but also invaluable, hence rendering the order of learned sessions court judge defective, null and void.

[23] On the above premise, I set aside the order of lower session court judge and order that this matter is remitted to the same court for admission and consideration of the guardian ad litem report.

[24] There shall be no order to cost.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh